FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 11 1979
MICHAEL RODAK, JR., CLERK

Nos. 77-1652 and 77-1654

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

SHELL OIL COMPANY, ET AL.

CONSUMER ENERGY COUNCIL OF AMERICA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION AS PETITIONER IN NO. 77-1652

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The argument of the respondent producers is based on the proposition that Section 1(b) of the Natural Gas Act grants jurisdiction to the Commission over the sale of only so much dedicated gas as the certificated producer chooses to produce (Shell Br. 22; Tenneco Br. 15).[1] On

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[1] *E.g.*: "The Commission's authority to insure that gas which is produced is *sold* in interstate commerce most assuredly does not carry with it the authority to compel or regulate the rate of production of that gas." Tenneco Br. 15 (emphasis in original).

this theory, if production is reduced or terminated by the producer willfully or negligently, where the supply of dedicated gas is not depleted, the Commission has no power to restore delivery service by invoking its authority under Section 7(b) to regulate abandonment or its authority under Section 4(d) to regulate changes in service.

This contention would effectively nullify the concept of dedication of producer reserves to interstate commerce that has been developed by this Court since it held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), that the Natural Gas Act applies to independent producers. See, *e.g.*, *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 156 (1960); *California* v. *Southland Royalty Co.*, 436 U.S. 519 (1978). The dedication concept is based on the producers' obligation to maintain the certificated service of delivering gas to interstate commerce and on the Commission's authority to enforce that obligation under the Act.

The respondent producers and the amici supporting them fail to confront the central legal issue in this case, which may be illustrated by a simple hypothetical. Suppose that a producer, having obtained a certificate from the Commission authorizing interstate sales from specified gas reserves, fails (for whatever reason) to undertake the most elementary maintenance of its production facilities, so that they fall into disrepair with the result that production, and hence deliveries, cease. The issue is whether the Commission has authority under the Natural Gas Act to do anything about it.

The Commission contends that it does; indeed, that it must take action in such a situation if the service obligation established by *Sunray*, *supra*, and other cases (see our main brief at 20-22) is to have any meaning. The court of appeals held that the Commission has no such authority. The respondent producers avoid the question.

They argue at length that the mechanics of gas production are complicated, that producers have little or no incentive to curtail production, and that the states already adequately regulate the production of natural gas.[2] All of these factual contentions may be assumed for the sake of argument. The legal question remains whether the Commission has the power under the Natural Gas Act to enforce delivery obligations in those cases (whether few or many) where unreasonable operation results in the cessation of production and delivery.

We have argued in our main brief (pages 23-30) that the Commission has that power under the Act as interpreted in this Court's decisions, and that the production or gathering exclusion of Section 1(b) of the Act does not deprive it of that power.

Respondents misread the history and purpose of the production or gathering exclusion in Section 1(b). That provision's purpose, as this Court has held (*e.g.*, *Phillips Petroleum Co.* v. *Wisconsin*, *supra*, 347 U.S. at 679), was not to limit the jurisdiction granted affirmatively to the Commission by Section 1(b)—jurisdiction that necessarily includes power under Section 7(b) and Section 4(d) to assure delivery of dedicated gas while the supply lasts. Its purpose was to confirm that the states' jurisdiction over conservation and health and safety was not to be curtailed by the federal regulation (see our main brief at pages 24-30). The states, however, have no constitutional authority or responsibility to regulate interstate delivery; that is why the Natural Gas Act was adopted. *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 689-693 (1947). Consequently, the states do not require maintenance of production in aid

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[2]See Shell Br. 3-5, 28-31; Tenneco Br. 15, 19-20.

of interstate delivery obligations.[3] The proposition advanced by the producers and adopted by the court of appeals would open a gap between the regulation by the states and the regulation of interstate delivery obligations permitted to the Commission under the Act.

The producers advance a number of contentions that are speculative and not ripe for review at this time. *Shell et al.* contend, for example, that the incorporation of a prudent operator standard into the producers' delivery obligations will result in conflict with state conservation requirements or in unrealistic production demands (Br. 28-29). There is no basis for that prediction; as we noted in our main brief (pages 31-33), the Commission stated that its prudent operator standard encompasses the obligations imposed by valid state regulatory standards and is to be administered with reference to those standards (Pet. App. 20a).[4] It cannot be assumed, therefore, that the Commission will require producers to drill wells in violation of state conservation standards.

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[3]Similarly, neither the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, nor the Energy Policy and Conservation Act, 42 U.S.C. 6214, confers authority on the Department of the Interior to enforce certificated delivery obligations under the Natural Gas Act.

[4]State conservation laws and orders may be invalid under the Due Process, Commerce, or Supremacy Clauses of the Constitution if they: (1) have no reasonable relation to the prevention of waste or the protection of correlative rights, *Thompson* v. *Consolidated Gas Utility Corp.*, 300 U.S. 55, 59-70 (1937); (2) operate as a partial or total embargo against the interstate sale and delivery of gas, *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911); (3) establish maximum or minimum prices for interstate sales of natural gas, *FPC* v. *Corporation Commission of State of Oklahoma*, 362 F. Supp. 522 (D. Okla. 1973) (3-judge court), affirmed, 415 U.S. 961 (1974); (4) cause withdrawal of a large volume of gas from the established interstate current of gas, *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 632-633 (1972); or (5) indirectly regulate purchase prices by pipelines or the volumes that pipelines may take from producers for interstate delivery, *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas*, 372 U.S. 84 (1963).

Indeed, any assumptions about what the prudent operator standard as administered by the Commission may require in particular cases, such as Shell's prediction that the Commission will say that a producer "must drill wells and install additional production equipment to maintain the deliverability of his wells" (Br. 24; see also *id.* at 14), are speculative. All that is at issue in this rulemaking proceeding is the Commission's statutory authority to adopt and enforce a standard defining the delivery obligations of producers under the Act.[5]

For the foregoing reasons and the reasons stated in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1979

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[5]That standard is not, as *Shell et al.* contend (Br. 31-32), an invalid retroactive limitation on existing certificates. It simply gives content to the delivery obligation that those certificates imply. See the Commission's opinion at Pet. App. 21a.

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